SC94115

IN THE SUPREME COURT OF MISSOURI

THE CITY OF HARRISONVILLE,

Appellant-Respondent,

v.

McCALL SERVICE STATIONS d/b/a BIG TANK OIL, et al.; THE MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND,

Respondents-Appellants.

Appeal from the Circuit Court of Cass County
The Honorable Jacqueline A. Cook, Judge

SUBSTITUTE BRIEF OF RESPONDENT-APPELLANT
The Missouri Petroleum Storage Tank Insurance Fund

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ATTORNEYS FOR MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND

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JURISDICTIONAL STATEMENT

This case was tried as a jury trial before Judge Jacqueline Cook in the Circuit Court of Cass County, Missouri. The jury returned verdicts of actual and punitive damages against Appellant, the Missouri Petroleum Storage Tank Insurance Fund. All of the parties filed notices of appeal. This Court transferred the appeal from the Missouri Court of Appeals, Western District, pursuant to Art. V, § 10, of the Missouri Constitution.

STATEMENT OF FACTS

THE LEAK

In 1997, a gas station owned by McCall Service Stations ("McCall") in the City of Harrisonville, Missouri ("the City") discovered a leak from an underground storage tank. (Tr. 172, lines 11-13). McCall notified the Missouri Department of Natural Resources ("DNR") and the Missouri Petroleum Storage Tank Insurance Fund ("PSTIF" or "the Fund"). (Tr. 172, lines 11-18). The Fund acknowledged that the Fund's coverage for the leak was triggered when the leak was reported. (Tr. 509, lines 2-3). At some point, the contamination plume migrated beyond the gas station boundaries. (Pl. Trial Ex. 55; Tr. 244, lines 1- 21). Fleming Petroleum bought the gas station from McCall in 2000. (Tr. 182, lines 3- 7).

McCall employed Bob Fine to prepare and execute a plan to contain and remediate the leak plume. (Tr. 172, line 23, to 173, line 5; Tr. 205, lines 2-6). Mr. Fine executed the DNR-approved plan, installing monitoring wells on both sides of Joy Street in the City, a street contiguous to the gas station. (Tr. 173, lines 9-12; Tr. 251, lines 1-21).

THE SEWER PROJECT

In 2003, the City decided to upgrade a city sewer line. (Pl. Trial Ex. 90; Tr. 49, lines 20-25). To increase sewage capacity, the City decided to replace sewer pipe with a larger diameter pipe over about a mile-and-a-half stretch.

(Tr. 51, lines 21-23). The City planned to run part of the new sewer line down Joy Street near the gas station. (Tr. 50, lines 13-17). The City planned to run another part of the new sewer line beside a creek on property north of the gas station. (Tr. 50, lines 15-21). The City hired an engineering firm, George Butler & Associates (GBA), to design the project and put a scope of services together so that the project could be let out for public bidding. (Tr. 47, lines 22-25). After submitting the project for public bidding, the City hired Rose-Lan Construction. (Tr. 48, lines 1-6).

During construction, Rose-Lan encountered petroleum-contaminated soil. (Tr. 52, lines 4-7; Tr. 70, lines 12-22; Tr. 287, line 11 to Tr. 288, line 2). Rose-Lan did not have the personnel or qualifications to construct the sewer through the petroleum-contaminated soil. (Tr. 70, lines 12-22). So Rose-Lan could not, on its own, complete the job unless all of the soil was removed and replaced. (*Id.*)

PRE-CONTRACT COMMUNICATION

The City sought bids for performing remediation and construction work for the stretch of sewer line running through the petroleum-contaminated soil. The City obtained bids from BV Construction (BV) and FineEnvironmental (Fine). (Pl. Trial Ex. 7; Tr. 66, lines 1-14). The BV bid was in the neighborhood of $185,000.00. (Tr. 466, lines 11-17). Fine's bid was a little bit less. (*Id.)*

Someone contacted the PSTIF. Talks began to find a way to complete a remediation project that would allow the sewer construction to be completed. (Tr. 59, lines 2-17). Pat Vuchetich, an employee of Williams and Company, the Fund's third-party administrator, participated in these talks. (Tr. 81, line 20-25).

To see if the remediation and construction job could be done for less than the amounts that had been quoted to the City, Mr. Vuchetich called several companies that had previously performed remediation work in the area, including Shaun Thomas of Midwest Remediation, Inc. (Tr. 466, lines 16-20; Tr. 467, lines 5-22). Mr. Vuchetich worked with Mr. Thomas to get the lowest bid that he could get for both the remediation and the construction job. (Tr. 468, lines 4-23). The bid from Midwest Remediation, prepared by Mr. Thomas, was $175,161.41. (Pl. Trial Ex. 98; Tr. 431, lines 11-24). This included digging out the contaminated soil along the sewer line, hauling it to a landfill approved to receive the contaminated soil, and completing the replacement of the sewer pipe in the contaminated area. (Tr. 438, line 21-3; Pl. Trial Ex. 98; Tr. 442, lines 1-6). Completion of the project also required the testing and installation of special petroleum-resistant pipe and other fittings, all of which cost more than the standard pipe and fittings originally specified in the Rose-Lan construction contract with the City. (Tr. 441, lines 10-25).

The discussions continued with a meeting in Harrisonville on April 15, 2004. (Tr. 73, lines 5-20). Mr. Vuchetich attended for the Fund. (*Id.*) Shaun Thomas of Midwest Remediation attended. *Id.* City officials present included City Administrative Dianna Wright, City Engineer Ted Martin, and City Attorney Steven Mauer. (*Id.*)

Ms. Wright testified that at the meeting, Mr. Vuchetich said that Midwest Remediation was well qualified to do the work, that the Midwest Remediation bid was "reasonable," and that Midwest Remediation could do the job for less money than the City's other bidders (Tr. 82, lines 1-6; Tr. 470, lines 20-25). Ms. Wright acknowledged that Mr. Vuchetich said that the City's engineers, George Butler and Associates, should bear some of the City's additional costs and that the City should bear some of the costs. (Tr. 132, lines 18-24). Ms. Wright also testified that Mr. Vuchetich said that if the City and Rose-Lan would hire Midwest Remediation for the project, the Fund would pay Midwest's bill. (Tr. 87, lines 6-7; Tr. 92, line 23 to 93, line 1).

On April 22, 2004, Mr. Vuchetich sent a fax to Ms. Wright as City Administrator. (Def. Trial Ex. 153A). Mr. Vuchetich advised the City of various "tasks to complete" "to resolve the matter" following the April 15 meeting. *Id.* The next day, the City's attorney sent a letter suggesting the City's own terms to resolve the matter as between the City and the Fund. (Tr. 482-83). On May 4, 2004, Mr. Vuchetich offered the City $50,000. (Tr. 486)

THE CONTRACT

On July 21, 2004, Rose-Lan Construction subcontracted with Midwest Remediation, Inc. to perform the remediation and construction work on the sewer project. (Def. Trial Ex. 179). A few days later, the City implemented the execution and payment for the contract with Midwest Remediation with Change Order No. 3. (Tr. 96, line 1, through 97, line 7; Tr. 97, lines 1-7).

THE CLAIM

After the work was completed, the City of Harrisonville submitted a claim to the Fund for the sum of $172,100.98, calculated as follows:

Midwest Remediation Contract as	
bid by Shaun Thomas	$175,161.41
Plus Rose-Lan profit	+$4,064.98
Plus Additional bond for Midwest	+$1,170.00
Less Rose-Lan calculation of pro-rata	
cost of this portion of sewer work	-$25,138.41
Total Claimed Cost to Remove	
Contaminated Soil	$155,257.98
Plus Soil and water testing not related	+4,660.00
Plus GBA engineer's bill	+$12,183.00

Total cost claimed by City $172,100.98

(Pl. Trial Ex. 111; Tr. 102, line 13, to 104, line 15; Tr. 95, lines 9-15; Pl. Trial Ex. 31D; Tr. 98, lines 1-25 (testing for work not done); Pl. Trial Ex. 31X; Tr. 99, line1, to 100, line 2 (George Butler & Associates billing)).

PROCEDURAL HISTORY

The City filed this suit against McCall, Fleming, and the Fund on November 30, 2005. The case was set for trial a number of times. But continuances were requested by both defendants and the City of Harrisonville. And the trial judge set the case over due to the pendency of other cases and court conflicts a number of times. (L.F. 1-10 (Circuit Court Docket): 14 March 2007 Plaintiff's Continuance Request; 20 April 2007 Defendant's Continuance Request; 14 March 2008 Plaintiff's Continuance Request; 15 September 2009 Plaintiff's Continuance Request; 07 December 2009 Hearing/Trial Cancelled; 15 March 2010 Hearing/Trial Cancelled; 07 April 2010 Hearing/Trial Cancelled per attorney for City; 07 June 2010 Hearing/Trial Cancelled; 03 September 2010 Defendant's Continuance Request; 01 October 2010 Hearing/Trial Cancelled by Court; L.F. 74-76 (Plaintiff's Motion for Continuance)). The case finally went to trial in May 2011.

The jury returned verdicts for the City against McCall and Fleming in the amount of $172,100.98 in actual damages on the nuisance and trespass

counts, and $100.00 for punitive damages for trespass to land. L.F. 451-454, 457-458. Against the Fund, the jury returned a verdict in the amount of $172,100.98 in actual damages and $8,000,000.00 in punitive damages. L.F. 455-456, 459.

Defendants filed post-trial motions seeking a judgment notwithstanding the verdict (JNOV) for the Fund or a new trial on the actual and punitive damages verdicts, and a judgment notwithstanding the verdict or new trial for defendants McCall and Fleming on the actual and punitive damages verdicts. L.F. 462-487.

The trial judge entered an Order on September 14, 2011, granting remittitur under § 537.068, reducing the jury's award of punitive damages to $2,500,000.00. L.F. 553-557.

All parties filed timely notices of appeal.

POINTS RELIED ON

I. The trial court erred in submitting the City's fraud claim to the jury and in failing to grant the Fund's motion for judgment notwithstanding the verdict on that claim, because the City did not make a submissible case of fraud, in that it presented no evidence that the City relied to its detriment on the alleged promise that the Fund would pay the Midwest Remediation bill.

Dubinsky v. Mermart, LLC, 595 F.3d 812 (8th Cir. 2010)

In re Master Mortg. Inv. Fund, Inc.,

161 B.R. 228 (Bkrtcy. W.D. Mo. 1993)

Trimble v. Pracna, 167 S.W.3d 706, 712 (Mo. 2005)

II. The trial court erred in failing to grant the Fund's motion for judgment notwithstanding the verdict and set aside the jury's award of punitive damages, because the Fund is not subject to an award of punitive damages, in that no statute authorizes the Fund to pay punitive damages awarded against the Fund itself, and § 319.131.5, RSMo, provides that the Fund shall not pay damages of an intangible nature or punitive damages awarded against insureds.

Section 319.131.5, RSMo 2000

State ex rel. MoGas Pipeline, LLC v. Mo. Public Serv. Comm'n,
366 S.W.3d 493, 496 (Mo. 2012)

III. The trial court erred and abused its discretion by entering a judgment in the amount of $2,500,000 in punitive damages in favor of the plaintiff against the Fund, because under § 510.265.1(2), RSMo Supp. 2005, punitive damages are limited to five times the actual damages, in that five times the actual damages of $172,100.98 is $860,504.90. (Responds to Appellant/Respondent's Point I.)

Section 510.265.1(2), RSMo Supp. 2005

Bone v. Dir. of Revenue, 404 S.W.3d 883, 886 (Mo. 2013)

Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.,
950 S.W.2d 854, 858 (Mo. 1997)

IV. The trial court erred and abused its discretion by entering a judgment in the amount of $2,500,000 in punitive damages in favor of the plaintiff, because under the Due Process clauses of the state and federal constitution, punitive damages are limited to a single digit multiple of the actual damages, and the

punitive damages awarded here—even after remittitur—were 15 times the actual damage verdict.

State Farm Mutual Auto. Ins. Co. v. Campbell,

538 U.S. 408 (2003)

Vaughan v. Taft Broadcasting Co.,

708 S.W.2d 656 (Mo. banc 1986)

STANDARDS OF REVIEW

The standard of review is the same for a decision on both a motion for a directed verdict and a motion for judgment notwithstanding the verdict (Point I and to some degree Point II below). *Blue v. Harrah's North Kansas City, LLC,* 170 S.W.3d 466, 472 (Mo. App. W.D. 2005), citing *Porter v. Toys 'R' Us-Del., Inc.*, 152 S.W.3d 310, 315-316 (Mo. App. W.D. 2004). The defendant is entitled to have the motion granted if the plaintiff fails to make a submissible case. *Id.* To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.*

When deciding whether the plaintiff made a submissible case, the appellate court views the evidence and all reasonable inferences from it in the light most favorable to the plaintiff and disregards all evidence to the contrary. *Id.* An appellate court will not overturn a jury's verdict unless there are no probative facts in the record to support that verdict. *Id.* Whether the particular facts on the record are sufficient is a question of law, and questions of law will be reviewed without deference to the trial court's conclusions of law. *Miller v. Kansas City Station Corp.*, 996 S.W.2d 120, 122 (Mo. App. W.D. 1999); *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

When the issue is one of statutory or constitutional interpretation (Points III and IV and the rest of Point II below), a question of law, review is de novo. *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. 2014).

As to remittitur (Point V below), the standard of review is abuse of discretion. *See Steuernagel v. St. Louis Pub. Serv. Co.*, 238 S.W.2d 426, 431-32 (Mo. banc 1951) ("If the evidence viewed in the light most favorable to upholding the ruling of the trial court, does afford reasonable and substantial support for the trial court's … remittitur, then there could be no abuse of discretion and the trial court's action must be sustained."), quoted with approval, *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 37 (Mo. 2013).

ARGUMENT

I. The trial court erred in submitting the City's fraud and negligent misrepresentation claims to the jury and in failing to grant the Fund's motion for judgment notwithstanding the verdict on those claims, because the City did not make a submissible case of fraud or negligent misrepresentation, in that it presented no evidence that the City relied to its detriment on the alleged promise that the Fund would pay the Midwest Remediation bill.

The City failed to prove an essential element of its fraud claim: detrimental reliance.

The City's key claim against the Fund—the claim on which the City sought and obtained punitive damages against the Fund—was a claim of fraud. *See* First Amended Petition for Damages, Count V (L.F. 57-59). "There are nine essential elements of fraud, and failure to establish any one is fatal to recovery." *Trimble v. Pracna*, 167 S.W.3d 706, 712 (Mo. 2005). Those nine elements are:

> 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity, or his ignorance of its truth; 5) the speaker's intent that it should be acted on by the person and in the manner

> reasonably contemplated; 6) the hearer's ignorance of the falsity of the representation; 7) the hearer's reliance on the representation being true; 8) his right to rely thereon; and, (9) the hearer's consequent and proximately caused injury.

Heberer v. Shell Oil Co., 744 S.W.2d 441, 443 (Mo. banc 1988). Here, the City failed to prove a "consequent and proximately caused injury" resulting from the City's reliance on the statement made by Mr. Vuchetich. That failure was "fatal to [the City's] recovery."

In considering the City's burden at trial with regard to its fraud claim, we must first recognize a key point: there has never been a dispute that the City had to hire someone with the special qualifications and ability to handle construction in contaminated soil and to dispose of the soil that was necessarily displaced. As the City declares, City Brief at p. 3, its contractor, Rose-Lan, was not qualified to do the work. Thus the jury was never asked whether the sewer could be built through the contaminated area by the same contractor, under the original contract, at the contract price, or in the same manner as it was being built elsewhere. Nor was the jury asked whether it cost more to excavate and build in the fashion required by concerns created by the contamination. It would and did.

In the City's First Amended Petition for Damages, the City claimed that its fraud injury—its basis for fraud damages, including punitive damages—was the result of its reliance on the promise made by the Fund's representative, Mr. Vuchetich, that the Fund would pay the additional costs of the sewer project due to the petroleum contamination if the City "allowed Midwest and/or Rose-Lan to proceed with the remediation work . . . ." (L.F. 58). The question, then, was *only* whether because of Mr. Vuchetich's statement, the City incurred greater expense than it would have otherwise incurred. And nowhere in the trial record does the City even attempt to prove that point.

To the contrary, even the uncontroverted evidence from the City's witnesses disproved it. The result of the City's reliance on Mr. Vuchetich's alleged statement was that the City *saved* $30,000. (Tr. 151, lines 9-23; Tr. 316, lines 16-25). Choosing Midwest Remediation did not result in a loss—and a loss based on reliance is a required element of a cause of action for fraud.

The Court of Appeals took a strange turn in considering the Fund's challenge to the City's proof. The Court of Appeals listed three things that the City did in reliance on Mr. Vuchetich's statement:

> Based upon the preceding facts, the City presented substantial evidence to allow the trier of fact to find

> that the City relied on the Fund's representations when it decided: to hire Midwest Remediation at all; to hire them without a competitive bidding process; and to accept the less costly alternative of leaving much of the contaminated soil in place, rather than excavating all of it.

Slip op. at 21. Missing from that list is any injury actually resulting from Mr. Vuchetich's statement—*i.e.*, *detrimental* reliance.

- The City put on no proof that "hir[ing] Midwest Remediation" resulted in costs to the City beyond those that the City was to incur if it did not "hire Midwest Remediation."
- The City put on no proof that if it had used "a competitive bidding process," it would have gotten a lower price than the one offered by Midwest Remediation.
- The City put on no proof that it incurred any additional expense or other loss because of its choice "to accept the less costly alternative of leaving much of the contaminated soil in place, rather than excavating all of it." That the Fund saved money—in the near term—told the jury nothing about the City's cost of reliance. The City did not claim, much less prove, that it was asked to sign or actually signed a release of its claim for further remediation in the

> right-of-way, remediation that may still be required in the future if the City needs to expand its sewer in its easement through the contaminated area. According to the record made by the City at trial, then, the City gave up nothing in return for the Fund's short-term savings.

Because the record at trial did not contain evidence of *detrimental* reliance on Mr. Vuchetich's April 22 statement, it was insufficient to make a submissible fraud case.

What the City ultimately proved looks not like a fraud claim, but a breach of contract claim, *i.e.*, a claim that the Fund, through Mr. Vuchetich's statement on April 15, contracted or promised to pay the Midwest Remediation bill, but then breached that agreement. A breach of contract action cannot be metamorphosed into a fraud action merely by alleging reliance on representations that a contract will be performed. *Morrill v. Becton, Dickinson and Co.*, 747 F.2d 1217, 1222 (8th Cir. 1984); *Titan Const. Co. v. Mark Twain Kansas City Bank*, 887 S.W.2d 454, 459 (Mo. App. W.D. 1994); *State ex rel. William Ranni Assoc., Inc. v. Hartenbach*, 742 S.W.2d 134, 140 (Mo. banc 1987). And presumably the reverse is true: a fraud claim in a petition cannot be metamorphosed into a breach of contract claim.

Under the law of many states, including Missouri, a plaintiff who wishes to assert a cause of action for fraud in connection with a claimed

breach of contract must show that the independent tort of fraud caused damages beyond those suffered by breach of the contract. *Dubinsky v. Mermart, LLC*, 595 F.3d 812 (8th Cir. 2010); *In re Master Mortg. Inv. Fund, Inc.*, 161 B.R. 228 (Bkrtcy. W.D. Mo. 1993) (Kansas law); *Reis v. Peabody Coal Co.*, 997 S.W.2d 49 (Mo. App. E.D. 1999). The Bankruptcy Court in *In re Master Morg. Inv. Fund, Inc.* expressed the general legal principles:

> Under Kansas law, damages for breach of contract are limited to pecuniary losses sustained, and exemplary or punitive damages are not recoverable in the absence of an independent tort. *A plaintiff who wishes to assert a cause of action for fraud in connection with a breach of contract must show that the independent tort of fraud caused damages beyond those suffered by the breach of contract.* A breach of contract action cannot be metamorphosed into a fraud action merely by alleging reliance on representations that the contract will be performed. *Entering a contract and willfully failing to perform is a breach of contract only.* Where the facts alleged in a tort claim are the same as those alleged in a contract claim and where the measure of damages is the

> same, no claim based on an extracontractual tort duty is allowed.

161 B.R. at 235 (citations omitted; emphasis added).

Courts sometimes use the term "economic loss doctrine" when referring to this distinction between breach of contract and other economic causes of action, and tort damages, such as fraud. The U.S. Court of Appeals for the Eighth Circuit explained, "The economic loss doctrine [bars] recovery of purely pecuniary losses in tort where the injury results from a breach of a contractual duty." *Zoltek Corp. v. Structural Polymer Group, Ltd.*, 2008 WL 4921611, at *3 (E.D. Mo. 2008), aff'd on other grounds, 592 F.3d 893 (8th Cir. 2010), quoted with approval, *Dubinsky v. Mermart, LLC*, 595 F.3d at 819. Applying Missouri law, that court used language that parallels the Bankruptcy Court language quoted above: "A fraud claim is permitted only if it arises from acts that are *separate and distinct* from the contract." *Id.* at 820, citing *O'Neal v. Stifel, Nicolaus & Co., Inc.*, 996 S.W.2d 700, 702 (Mo. App. E.D. 1999) (emphasis added). *See also Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.,* 53 F.3d 195 (8th Cir. 1995) ("Missouri prohibits a cause of action in tort where the losses are purely economic.")

Here, the City did not prove "damages beyond those suffered by the breach of contract." Its effort to call the jury's attention to "acts separate and distinct from the contract" was based on delays in the litigation that arose

when the Fund and the City did not come to agreement on the amount that the Fund was to pay, based on Mr. Vuchetich's statement. *See* Tr. 5, 25. But the City never presented proof that the litigation delay itself injured the City. In the absence of such proof, the Court should reverse the judgment for actual and punitive damages based on fraud.

II. The trial court erred in failing to grant the Fund's motion for JNOV and set aside the jury's award of punitive damages, because punitive damages were not submissible to the jury against the Fund in that no one has authority to pay punitive damages from the Fund, authority to pay out money from the Fund is limited to that provided by statute, and § 319.131.5, RSMo, provides that the Fund shall not pay damages of an intangible nature or punitive damages.

Because the Fund is not authorized to pay punitive damages, the punitive damages question should not have gone to the jury.

For purposes of our Point II, we assume that the City made a submissible case of fraud, including proof of detrimental reliance. The next question is whether the trial court could submit to the jury the question of punitive damages. And the first step in answering that question is to note who or what was sued—or, from whom or what were punitive damages sought.

In terms of State persons or entities, the City chose to name as a defendant only the Petroleum Storage Tank Insurance Fund. *See* L.F. at 46 (First Amended Petition for Damages). The City chose not to name as a defendant the "board of trustees [which is] a type III agency," nor any member of the board of trustees. § 319.129.8-.9. The City chose not to name

as a defendant the "executive director[, nor any] other employees … who [are] state employees," nor any "[s]taff … provided by the department of natural resources or another state agency." § 319.129.8-.9. Thus neither in the court below nor in this Court can the City raise the question whether punitive damages could be sought from any state agency or employee. The *only* question is whether the Fund itself—an account in the State Treasury—could be liable for punitive damages. Or more precisely, at this stage, whether the City could make a submissible case for punitive damages against the Fund.

The Fund, like other creations of the General Assembly, "can function only in accordance with its enabling statutes." *State ex rel. MoGas Pipeline, LLC v. Mo. Public Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo. 2012). The Fund has no inherent authority. For the Fund to pay punitive damages—or more accurately, for managers of the Fund to use moneys in the Fund to pay punitive damages—the General Assembly must have authorized them to do so. And it has not.

The Fund is created in § 319.129.1: "There is hereby created a special trust fund to be known as the "Petroleum Storage Tank Insurance Fund" within the state treasury …." In a single declarative sentence, the Court of Appeals accurately described the sole purpose and maximum scope of statutory authority of the Fund: "The Fund is a special trust fund created by statute to cover the costs of cleaning up contamination caused by leaking

underground petroleum storage tanks." Western District Slip Op. at 22. The statutes invoked by the City as plaintiff in this case—indeed all of the statutes that regulate the Fund—only give the Fund authority to "cover the costs of cleaning up contamination." And punitive damages are not a "cost of cleaning up contamination."

Sharpening the statutory focus, the General Assembly specifically barred the Fund from paying punitive damages assessed against petroleum storage tank operators:

> 5. The fund shall provide coverage for third-party claims involving property damage or bodily injury caused by leaking petroleum storage tanks …. *The fund shall not compensate an owner or operator for repair of damages to property beyond that required to contain and clean up a release of a regulated substance or compensate an owner or operator or any third party for* loss or damage to other property owned or belonging to the owner or operator, or for any loss or damage of an intangible nature, including, but not limited to, loss or interruption of business, pain and suffering of any person, lost

> income, mental distress, loss of use of any benefit, or *punitive damages*.

§ 319.131.5. That exclusion confirms the General Assembly's intent that the money paid into the Fund be used only to pay the "costs of cleaning up contamination"—*i.e.*, expenses directly tied to current and future public health and welfare—not to pay even consequential damages.[1]

Given the absence of any authority for money in the Fund to be used to pay punitive damages assessed against the Fund itself, and the express bar

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[1] This case is distinguishable from *Rees Oil Co. & Rees Petro. Prod., Inc. v. Dir. of Revenue*, 992 S.W.2d 354 (Mo. App. W.D. 1999) and *River Fleets, Inc. v. Carter*, 990 S.W.2d 75 (Mo. App. W.D. 1999). In *Rees Oil*, the plaintiff sought a refund of amounts improperly paid to and deposited in the Fund. In *River Fleets*, the plaintiff sought interest accrued on such amounts. In each case, the holding was that the amount sought was an amount that but for erroneous collection would have never been deposited into the Fund—and thus that the amount at issue should have never been available to clean up petroleum contamination. Here, by contrast, the amount sought was properly deposited into the Fund and is available for the Fund's purpose—or would be, but for the need to hold it for payment to the City, if and to the extent that the City prevails in this appeal.

on reimbursing insureds for punitive damages assessed against them, the question really does become whether the question of punitive damages may be submitted to the jury despite those points. The answer should be "no."

We recognize that submissibility and award, and subsequent payment of damages awarded, are distinct questions. That may be what led the Court of Appeals to implicitly conclude that it could uphold the award of punitive damages against the Fund and leave the question of whether the Fund could actually pay such an award for another day. But it seems illogical—and certainly contrary to judicial economy—to require that jurors consider whether to award punitive damages that cannot, as a matter of law, ultimately be recovered from a defendant such as the Fund.

III. The trial court erred and abused its discretion by entering a judgment in the amount of $2,500,000 in punitive damages in favor of the plaintiff, because under § 510.265.1(2), RSMo Supp. 2005, punitive damages are limited to five times the actual damages, in that the City did not timely raise its constitutional challenge, and the statute is constitutional as applied to the City and the Fund. (Responds to Appellant/Respondent's Point I.)

The statutory cap on punitive damages is constitutional as to the City as a plaintiff and the Fund as a defendant.

Again, we assume that the City made a submissible claim of detrimental reliance to justify the jury considering the fraud claim. And we assume that it was appropriate to submit to the jury the question of punitive damages. The next two questions go to the amount of the award. In this Point III, we discuss the circuit court's refusal to apply the statutory limit on punitive damages. Only if that limit is not applied is it necessary to proceed to Point IV, addressing due process limits on punitive damage awards, or to Point V, addressing the circuit court's use of the remittitur statute.

As noted above, the jury returned a verdict against the Fund in the amount of $172,100.98 of actual damages and $8,000,000 of punitive damages (L.F. 451, 459, 488- 90). That immediately implicated the cap on the

amount of punitive damages found in § 510.265.1(2), RSMo Supp. 2005. The Court of Appeals applied that cap. But the City asserts that to apply the cap violates the right to trial by jury found in Article I, § 22(a) of the Missouri Constitution—a claim the City bases on this Court's recent holding in *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014). But the City fails to even address the significant differences between that case and this one. Before addressing those differences, however, we turn briefly to the question of whether the claim was timely raised.

A. The City did not timely assert its claim of unconstitutionality.

"A constitutional question must be presented at the first available opportunity that orderly procedure and good pleading will allow given the circumstances of the case. Otherwise, the argument will be waived." *Bone v. Dir. of Revenue*, 404 S.W.3d 883, 886 (Mo. 2013). This case presents the question, "What is the first available opportunity that orderly procedure and good pleading allow" for a party to challenge a ceiling on punitive damages, when that party seeks punitive damages in its petition? The City does not now claim, and did not claim below, that anything prevented it from

raising that question in its Petition. The City nonetheless argues that it could defer raising the question until after the verdict.[2]

The City's first theory is that it was excused from raising the question in its Petition because it later "successfully argued to the trial court that the statutory damage cap did not apply." City Br. at 20. But the City cites no authority for that excuse. That a party later successfully argued that a statute does not apply for constitutional reasons ("because it could not be applied retroactively" (City Br. at 20) tells us nothing about whether "orderly procedure and good order" would have allowed that party to raise the question earlier.

The City then argues that the "first available opportunity" rule cannot be applied because the right to trial by jury is "inviolate." City Br. at 20-21. The City turns not to caselaw regarding the constitutionality of statutes, but to a case addressing when an individual may waive the jury trial right despite it being "inviolate." That case does not address, much less purport to

[2] Curiously, the City would refuse the Fund the same privilege as to a due process claim, asserted after the verdict, that the amount awarded in punitive damages was excessive when compared to the amount in compensatory damages. *See* City's Point II, City Br. at 27-29; p. 39-40, *infra.*

excuse, someone's delay until after a verdict to assert that a statute limiting its right to trial by jury was unconstitutional.

Finally, the City argues that this Court's decision in *Lewellen* means that the cap statute is void *ab initio*, thus excusing the City or anyone else with pending litigation from complying with the "first available opportunity" rule. In support of that proposition, the City finds just one allegedly comparable case—and that is a court of appeals decision that predates the current Constitution. City Br. at 22, citing *Lieber v. Heil*, 32 S.W.2d 792 (Mo. App. 1930). This Court should decline to erode the "first available opportunity" rule in the broad fashion that the City proposes.

B. The City has not shown that "heretofore" a city had a constitutional right to have a jury consider, without limit, awarding punitive damages against an account in the State Treasury.

In Art. I, § 22(a), the 1945 Missouri Constitution promises that "the right of trial by jury as heretofore enjoyed shall remain inviolate." As applied here, the question is whether in 1945 (or in 1820[3]) a political subdivision

[3] In *Lewellen*, this Court ignored the 1945, 1875, and 1865 constitutions, leaping straight to the 1820 document. This Court has been making that leap since *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 86-88

enjoyed a right to trial by jury of a claim against an account in the State Treasury for punitive damages. The City makes no attempt to show that it, or any other political subdivision, enjoys such a jury trial right.

1. The City as plaintiff.

In asserting that it would have had a jury trial right in 1945 (or 1820), it is not enough for the City to simply cite something from the list of rights in Article I. In the context of another Article I right—the bar on retrospective laws, Art. I, § 13—this Court has expressly declared that cities are not in the same position as individual persons:

> Because the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective

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(Mo. 2003). Of course, the only constitution that Ms. Lewellen or the City of Harrisonville could actually invoke is the 1945 document. And it seems unlikely that when they ratified the constitution in 1945, voters thought they were resurrecting jury trial rights that existed in 1820 rather than preserving the rights they understood they had at the time of the vote. But the distinction should not be dispositive here; so far as we have been able to ascertain, there was no more authority for a city to ask a jury to award punitive damages against a fund in the state treasury in 1820 than in 1945.

> laws that waive the rights of the state. … All of the representative plaintiffs are school districts. "School districts are bodies corporate, instrumentalities of the state established by statute to facilitate effectual discharge of the General Assembly's constitutional mandate to establish and maintain free public schools...." … As "creatures of the legislature," the rights and responsibilities of school districts are created and governed by the legislature. … Hence, the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition. …

Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo., 950 S.W.2d 854, 858 (Mo. 1997) (internal citations omitted).

Like school districts, "[m]unicipalities are creatures of the legislature." *Damon v. City of Kansas City*, 419 S.W.3d 162, 183 (Mo. App. W.D. 2013), citing *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975). They are "municipal corporations"—and thus, like school districts, a form of "bodies corporate." *See, e.g., St. Louis Hous. Auth. v. City of St. Louis*, 361 Mo. 1170, 1177-78, 239 S.W.2d 289, 294 (Mo. banc 1951) ("By both judicial recognition and common usage 'municipality' is a modern synonym of 'municipal

corporation'. 'Municipality' is all embracing. It includes, of course, cities of all classes ...."); *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458, 472 (1873); § 79.010, RSMo. And cities—again, like school districts—are "instrumentalities of the State." *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. banc 1962) (A city is "an instrumentality of the state established for the convenient administration of local government.").

Under *Savannah R-III*, Ms. Lewellen might have been able to make a "retrospective law" claim, but the City of Harrisonville could not.[4] But that is not the only Article I right that this Court has declared cannot be invoked by subdivisions of the State. This Court drew the same distinction with regard to due process claims: "Generally speaking, political subdivisions, such as school districts, lack such standing because they are not considered 'persons' having a constitutional right to due process or equal protection of the law." *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446, 450 (Mo. banc 1994). So

[4] That defeats the reliance of the City (City Brief at 23-26) and the circuit court (L.F. at 555) on *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. 2010). Though *Klotz* could invoke the "retrospective law" ban to avoid the application of a damages cap to a cause of action that accrued before the cap was enacted, under *Savannah R-III*, the City cannot.

again, though Ms. Lewellen might have been able to assert a due process claim, the City could not.

Nor can the City make a "jury trial" claim, for the same reason.[5] The City, as a creation of the State, is ruled by the General Assembly, not by the constitutional provisions that the founders granted to individual citizens. It has no more right to a jury trial than it has a right to avoid the application of a retrospective law.

Lewellen is inapposite; that the cap on punitive damages may be unconstitutional where it took away Ms. Lewellen's jury trial right does not make it unconstitutional when applied to a subdivision of the State, which lacks such a right. The General Assembly has the power to regulate the ability of political subdivisions to obtain punitive damages. And it did so in § 510.265.[6]

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[5] At least one Missouri court has recognized that cities and individual plaintiffs do not have the same jury trial rights, albeit in a different context. *State ex rel. Waters v. Teel*, 723 S.W.2d 892, 894 (Mo. App. S.D. 1987) (city lacks a right to a jury trial in municipal ordinance violation cases, even where an individual citizen has such a right).

[6] In its footnote 2, the City argues otherwise, invoking an exception in § 510.265.1(2): "Such limitations shall not apply if the state of Missouri is the

2. The Fund as defendant.

The identity of the defendant, like the identity of the plaintiff, distinguishes this case from *Lewellen*. That suits against the State and its governmental creations are different from suits against private persons seems obvious. It is most clearly manifest in cases involving sovereign immunity—which existed in Missouri beginning with statehood in 1820, and continued until well past the ratification of 1945 constitution. *See Wollard v. City of Kansas City*, 831 S.W.2d 200, 202 (Mo. banc 1992).[7] But we are not

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plaintiff requesting the award of punitive damages." The City does not claim to be "the state of Missouri." Rather, it cites § 70.120(3) and broadly claims "all statutory protections afforded to the State." City Br. at 27, n. 2. That is the definition of "political subdivision" solely for purposes of §§ 70-120-.200—what the Revisor labels, "Rural Resettlement or Rehabilitation Agreements." Nothing in those sections has application to § 510.265. And as Missouri courts have recognized, political subdivisions are *not* "the State" of Missouri—for example, for purposes of Legal Expense Fund payments. *See P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805 (Mo. App. W.D. 2011).

[7] The cases holding that the Fund lacks sovereign immunity—*Rees Oil*, 992 S.W. 2d at 359, and *River Fleets*, 990 S.W. 2d at 78—are based on the language used by the legislature to keep the Fund outside the scope of

aware of any authority for the proposition that in 1945 (or 1820) the common law recognized an action to obtain funds from an account in the State Treasury even if the account for some reason did not have sovereign immunity. And in its Brief, the City has not even hinted that such actions were allowed.

Indeed, this case presents a particularly clear justification for treating claims against a state fund—absent legislative action allowing private suits—differently from claims against private parties and private bank accounts. The statutory purpose of the Fund is not to accrue funds for state operations generally, which might include the payments of judgments, but specifically to relieve Missouri residents of the adverse impacts of petroleum pollution from underground tanks. Those who pay the fee (which, in an indirect sense, includes all of us) are contributing for that very particular purpose—and for no other. Paying punitive damages, in whatever amount, to the City of Harrisonville does *nothing* to achieve that purpose. Rather, it does

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Hancock Amendment refunds, made pursuant to Missouri Constitution Art. X, § 18. *See, e.g., Mo. Merchants & Manufacturers Ass'n v. State*, 42 S.W.3d 628 (Mo. 2001). That is a very modern development, not relevant to determining whether in 1945 (or 1820) it was possible to bring an action against an account in the State Treasury for punitive damages.

precisely the opposite: it takes money collected for a purpose that benefits the State and its citizens generally and redirects it as a unrestricted windfall to a single city.

To use the words of the Texas Supreme Court, albeit in the context of the exercise of sovereign immunity, to give the City the ability to draw millions from the Fund would "hamper governmental functions by requiring tax resources to be used for defending lawsuits . . . rather than using those resources for their intended purposes." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Nothing in the constitutional promise to individuals of the "right of trial by jury as heretofore enjoyed" suggests that those who wrote that language in 1820, nor those who ratified it in 1945, were promising cities or anyone else a right to have juries redirect large amounts of funds—whether collected as taxes or as "fees"—from their sole statutory purpose.

IV. The trial court erred and abused its discretion by entering a judgment in the amount of $2,500,000 in punitive damages in favor of the plaintiff, because under the Due Process clauses of the state and federal constitutions, punitive damages are limited to a single digit multiple of the actual damages, and the punitive damages awarded here—even after remittitur—were 15 times the actual damage verdict. (Responds to Appellant/Respondent's Point II in part).

The judgment exceeds the single digit multiple of actual damages allowed by due process precedent.

The jury's award of $172,100.98 in actual and $8,000,000 in punitive damages (L.F. 451, 459, 488- 90) also implicated due process concerns, cited by the Fund in the remittitur portion of its post-trial motion. (L.F. 462, 484). The trial court ultimately entered an Order reducing the punitive damage award to $2,500,000 (L.F. 553-557), which we address in Point V. But first we consider the due process claim as an independent constitutional claim. Before doing so, however, we address two concerns: the ability of the Fund to make a due process claim; and the timeliness of the Fund's assertion of such a claim.

The first concern is interconnected with the discussion in Point III above of the constitutionality of § 510.265. In explaining why the City does

not have a jury trial right, and thus the punitive damages cap is constitutional as applied to it, we pointed out that among the Article I rights that this Court has declared do not apply to political subdivisions is due process. *See* p. 33, *supra*. The City may well argue that the distinction applies to the Fund as well, and thus that the Fund cannot assert that the $8,000,000 award violated the Fund's due process rights. But to do so, the City would have to implicitly confirm that the Fund, despite the holdings that it lacks sovereign immunity, is a governmental entity akin to the City itself. We make the argument in this Point IV not to concede that under the common law the Fund could be subjected to punitive damages like a private entity, but because *if* the Court concludes that the City has a constitutional jury trial right *and* that the Fund could be sued under the common law, the Fund would have due process rights.

The second concern is timeliness: the City argues that the Fund was obligated to raise any due process claim before the jury rendered its verdict—just as the City claims it was not obligated to do as to its claim that § 510.265 is unconstitutional as applied to it. But the two circumstances are distinguishable in an important way: The City was the party seeking punitive damages, and knew from the outset that it was choosing not to put any kind of limit on those damages. But the Fund had no control over what the City would do, through pretrial or at trial. Though for the City to

anticipate it would want to challenge § 510.265 had an element of speculation, for the Fund to assert a due process claim at the outset of the litigation would have been speculation in its entirety.

We turn, then, to the substance of the due process claim. As the trial court noted, the ratio of the actual damages to punitive damages was 46 to 1 on the jury's verdicts—a figure that far exceeds the usual ratio permitted under U.S. Supreme Court precedent:

> This Court notes that the ratio of the punitive damages to the actual harm found is approximately 46:1. The United States Supreme Court has noted that in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. *State Farm Mut. Automobile Insurance Co., v. Campbell*, 538 U.S. at 424-25. However, the Supreme Court has also noted that low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if for example, a particularly egregious act has resulted in only a small amount of economic loss. *BMW of N. Am. Inc. v. Gore*, 517 U.S. at 582. This Court is mindful of the evidence from

> Plaintiff that, but for the fraud perpetrated upon it, it would have sought remediation of the contaminated soil costing $500,000.

(L.F. 557). Nonetheless, the court entered an order that exceeded the "single-digit" ratio:

> Based on all factors, this Court believes that the punitive damages in this case should be remitted to $2.5 million dollars. This amount reflects a 15:1 ratio to the actual damages awarded in this case or, considering the arguments of plaintiff as to total potential harm of $500,000, a 5:1 ratio which is also consistent with current legislative dictates.

(L.F. 557).

As a matter of law, this is not the kind of case in which something beyond the single-digit ratio is permissible. The amount of actual damages is substantial. And the actions by the Fund's managers—bound to preserve Fund assets for the very limited purpose for which they can be spent under the statute—were not "reprehensible," as the City claims.

The City's bulleted "reprehensibility" points lose their persuasive value when properly characterized. For example:

- Though the Fund allegedly "knew that toxins had migrated" (City Br. at 31) the General Assembly has never imposed on the Fund an obligation—or even authorized the Fund, which is merely an insurance fund—to identify and inform easement owners when someone affiliated with the Fund learns that one of the Fund's insureds has a covered event. The General Assembly could reasonably believe that the administrative costs and potential for prompting unnecessary litigation would make such a system of notification inadvisable.
- The City did not waive any right to have "all contaminated soil removed." *Id.*
- Assuming that the City even had a "bid process" (*id.*), finding a lower-cost provider benefitted—not harmed—both the City and taxpayers.
- The bill presented by the City that the Fund "refused and failed" to pay "year after year" (*id.*) added items such as "Rose Lan profit" to the amount that Midwest Remediation charged, less the original contract cost of construction through the contaminated area. *See* p. 6, *supra*.
- Though the Fund did not pay "year after year", City Br. at 32, the Fund did make offers to the City—although much of the evidence of

those offers was excluded at trial. *See* pp. 5-6, *supra*; L.F. pp. 401-436; Tr. 483-485).

Relative to the City's response to such offers, the City Manager testified, "So, we had asked for what was an estimated cost to, again, remediate that soil and replace the pipe, as we had agreed to previously. And the cost on that is $273,850.05." Tr. 101. That amount, of course, far exceeded what the City was awarded as actual damages at trial.

The circuit court's calculation of the $2,500,000 award as "a 5:1 ratio" relies on the premise that the ratio can be based not just on actual damages awarded, but on a single statement in the record that the court characterizes as "potential harm." Here is the testimony the circuit court relied on:

> Q. Okay. Now, what would it have cost to go in and remove the full width of the easement of the dirty soil, make sure that there's no contamination that's going to run into it, and then replace it with clean soil before you put in the new pipe?
>
> A. We're talking about a massive amount of dirt if that was the plan. The easement itself is very wide. And then dealing with contaminated soil is very expensive. There-s just -- to work in it, to work with

> it, you have to be trained, you have to be monitored. Disposing of the soil, you just can't dump that anywhere. It has to be specially handled and it has to be specially disposed of. The cost of that could range almost to a half a million dollars.

Tr. at 342-43. That is not testimony about what the City spent, nor even about what the City might have spent. It is testimony about the cost of a larger job, one that the City agreed—for now—no one had to undertake.

If the City had signed some kind of release, if it had given up its ability to have McCall and Fleming get the additional work done when it needs to be done, then including the full $500,000 in the ratio calculation might make sense. But in the actual circumstances here, it does not.

Both the $2,500,000 and $8,000,000 awards, then, unjustifiably exceed the "single digit ratio" permitted for punitive damages awards based on large judgments. Actual damages of $172,100.98 times 9 would equal an amount that would not implicate due process concerns.

V. The trial court correctly applied remittitur with regard to the jury's punitive damages verdict. (Responds to Appellant/Respondent's Points II and III.)

Again, we note that the jury returned a verdict in the amount of $172,100.98 of actual damages and $8,000,000 of punitive damages (L.F. 451 and 459; L.F. 488-490); that the Fund filed a motion asking the trial judge for remittitur (L.F. 462 – 487); and that the trial court ultimately entered an Order reducing the punitive damage award to $2,500,000. (L.F. 553-557). In its appeal, the City challenges that reduction.

In seeking remittitur, the Fund invoked the statute by which the General Assembly reinstated remittitur to Missouri law:

> A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages. …

§ 537.068. The Court of Appeals has very recently articulated the proper analysis when considering remittitur on appeal, quoting the statute:

> As with a compensatory-damage award, the trial court has broad discretion to remit a punitive-

> damage award if, "after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages."

Blanks v. Fluor Corp., No. ED97810, 2014 WL 4589815, at *80 (Mo. App. E.D. Sept. 16, 2014). Here, the circuit court, exercising its responsibility under § 537.068, implicitly found that awarding the City $8,000,000 in punitive damages from the Fund when the City was entitled to just $172,100.98 in compensatory damages "exceed[ed] fair and reasonable compensation for plaintiff's injuries and damages." That conclusion was not an abuse of discretion.

The circuit court looked to two sources as it determined a "fair and reasonable" award of punitive damages.

First, the court found "instructive" the punitive damages cap statute addressed in our Point III, § 510.265. L.F. at 555. The court did not apply the statute, holding instead (incorrectly—*see* p. 32, n. 4, *supra*) that it did not apply "because the claim accrued prior to the date of enactment of House Bill 393." *Id.* But the court included in its consideration "the public policy exemplified" by the cap statute.

In challenging on appeal the circuit court's use of remittitur, the City says that consideration of the cap statute was improper because the cap statute is unconstitutional (again, incorrectly, *see* Point III, *supra*). But that argument misses the point. Section 537.068 does not explain what "fair and reasonable compensation" means when applied to punitive damages. Regardless of the constitutionality of § 510.265, "the public policy exemplified" by the cap statute (L.F. at 555) gives some substance to the words of § 537.068. Even in instances like *Lewellen*, where § 510.265 cannot be constitutionally applied, it would still be appropriate to look at the multiple enacted there when considering what is "fair and reasonable."

Second, the circuit court looked at caselaw arising from due process claims. L.F. 555-557. Regardless of whether that consideration was compelled (as addressed in our Point IV), it was appropriate. Again, the Fund sought remittitur under § 537.068. L.F. 462 ("The Court should grant remittitur under Section 537.068, RSMo 2000 …."). The pertinent test was thus whether the jury's punitive damages award was "fair and reasonable compensation." Certainly amounts that exceed what due process protection precludes would not be "fair and reasonable." So the caselaw that interprets and applies the

due process clauses of the state and U.S. constitutions must be at least relevant to the circuit court's determination.[8]

To argue that diverting $8,000,000 from the Fund's efforts to clean up contamination was "fair and reasonable," the City labels the Fund's actions "reprehensible." City Br. at 30-32.

Ultimately, it was up to the circuit court to evaluate all the City's points made at trial and in post-trial filings and argument, and determine whether they made the diversion of $8,000,000 in cleanup funds a "fair and reasonable" amount to "compensate" the City for the allegedly "reprehensible" conduct. The circuit court concluded that $2,500,000—still a huge amount—was "fair and reasonable." That conclusion was not an abuse of the circuit court's discretion.

Thus if the Court concludes that the City did prove detrimental reliance despite the absence of evidence of damages beyond those attributable to breach of contract, that the circuit court could submit the question of punitive damages to the jury despite the lack of statutory authority for the Fund to pay punitive damages, that § 510.265 is unconstitutional as applied

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[8] Under the statute, addressed in this Point V, it is thus irrelevant whether the Fund "failed to assert any violation of due process as a defense at any time prior to entry of judgment." City's Point II.

to the City despite the City's lack of a constitutional jury trial right, and that due process concerns permit a double-digit punitive damages award, the Court should uphold the remittitur.

CONCLUSION

For the reasons stated above, the Court should reverse the awards of $172,100.98 in actual damages and $2,500,000 in punitive damages against the Fund. In the alternative, the Court should limit the amount of punitive damages as required by statute or due process. In the further alternative, the Court should affirm the circuit court's order of remittitur.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 9,709 words.

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